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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1934.

ARTHUR MATTSON, *Appellant*,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, *Appellee*.

No. 29

BRIEF ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington is reported in 76 Washington Decisions, page 255.

QUESTIONS PRESENTED

Questions presented are as follows:

(1) Does Subdivision (h) of Section IV, Chapter 310 of the Session Laws of the State of Washington, 1927, constitute an impairment of contract in violation of Section X, Article I of the Constitution of the United States?

(2) Does the said section violate the provisions of the Fourteenth Amendment?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix herein.

STATEMENT OF THE CASE

The appellant was injured upon the 27th day of February, 1927, while employed in extrahazardous industry as classified by the Workmen's Compensation Act, Section 7676 of Remington's Compiled Statutes of the State of Washington. A claim was filed with the appellee, Department of Labor and Industries, as required by statute, and compensation was thereafter paid. Final settlement of the claim was ordered by the Department on the 17th day of January, 1928, at which time compensation payment was closed with an award for permanent partial disability. Thereafter, on the 10th day of May, 1933, a formal petition for re-opening the claim of appellant was presented to the Department of Labor and Industries on the grounds that appellant's condition had become aggravated as a result of the injury sustained February 27, 1927. Upon the 29th day of May, 1933, an appeal having been taken from the order of the Supervisor of Industrial Insurance of the Department of Labor and Industries, refusing to re-open said claim to the Joint Board of said Department, said Joint Board entered an order sustaining the Supervisor and refusing to entertain the application for re-opening upon the grounds that the appellant had not complied with the provisions of the statute providing that the claim for further compensation upon the grounds of aggravation of disability must be made within three years from the date of the termination of compensation by the Department. From this order an appeal was taken to the Superior Court by the State of Washington, for Thurston County. The court sustained the action

of the Department of Labor and Industries. Thereafter, an appeal was taken to the Supreme Court of the State of Washington, which affirmed the lower court. Thereafter, the appeal to this court was prosecuted.

At the 1921 session of the Legislature of the State of Washington, there was enacted a law relating to compensation of injured workmen, which is set forth in full in the Session Laws of the State of Washington, 1911, Chapter 74 thereof. The statute as then enacted provided for continuing jurisdiction over workmen's claims for injury with regard to aggravation, diminution, termination of claim for disability without any limitation as to time within which application for further consideration on the part of the workman was to be made in order for the Department to retain jurisdiction. That provision of the statute is found in Chapter 74 of the Laws of 1911, Section 5, Subdivision (h) thereof. The law continued without change with regard to this particular provision until June of 1927, at which time Section 1 of Chapter 182 of the Laws of 1921, which constituted a re-enactment of the Laws of 1911 with amendments not here pertinent, was amended. Chapter 74, Section V, Subdivision (h) of the Laws of 1927 became Chapter 310, Section IV, Subdivision (h) thereof. That section became effective after the appellant herein had been injured, but before his compensation had been terminated originally. The section then provided that were there to be a change of condition, an application for further compensation was to be made within three years from the date of termination of compensation.

A saving clause was appended to Subdivision (h) of Section V, as above provided, to the effect that in all

cases where compensation had been established or terminated prior to the enactment of said amendment, claimant's whose claims had been so adjusted were to have three years from the taking of effect of the act within which to apply for such readjustment. The amendatory provision is contained in Section 7679, Subdivision (h) thereof, of Remington's Compiled Statutes of the State of Washington.

SUMMARY OF ARGUMENT

1. The Workmen's Compensation Act of the State of Washington Is Compulsory in Nature and Rests Upon Status and Is Not Contractual.

2. The Amendment of 1927 Did Not Constitute a Deprivation of Any Vested Right Possessed by the Appellant.

3. Rights Purely Statutory Fall With the Repeal of the Statute Creating Them.

4. The Workmen's Compensation Act Is Remedial Legislation and Consequently Creates No Vested Rights.

5. The Amendment in Question Constitutes a Valid Exercise of the Police Power.

6. The United States Supreme Court Is Bound by the Interpretation of the State Law as Decided by the Highest Court of That State.

7. The Right to Sue a Sovereign May Be Withdrawn by the Sovereign at Its Pleasure.

ARGUMENT

1

The Workmen's Compensation Act of the State of Washington Is Compulsory in Nature and Rests Upon Status and Is Not Contractual.

At the threshold of this argument it is indispensable that there be a clear understanding of the nature of the law known as the Workmen's Compensation Act of the State of Washington. The first assignment of error on the part of the appellant is to the effect that the amendment here in question constituted an impairment of the obligation of contract and a violation of the Federal Constitution.

Compensation acts either are elective or compulsory. Under elective statutes, the choice remains with the employer and the workman as to whether or not their relationship, in so far as it relates to injuries shall be covered by the Workmen's Compensation Act. However, under compulsory statutes there in no choice.

What is the nature of the Workmen's Compensation Act of the State of Washington? It needs but an examination of the first paragraph of the act as it now stands and has stood ever since the enactment of the same to determine this question. In order for there to be no doubt as to the constitutionality of the law, the Legislature declared that the enactment constituted an exercise of the police power. (See Appendix, R. C. S. 7673, page 1.)

Comment to the effect that no alternative was left either to the workmen or to the employer with regard

to whether or not he would elect to come within the provision of the act is certainly not needed to indicate that there was no choice in those industries which the Legislature thereafter proceeded to classify as being extrahazardous in nature. The Workmen's Compensation Act herein under discussion did not limit itself by way of penalty to the employer by depriving him of the defense of contributory negligence in case suit was brought against him and he had not contributed to the Workmen's Compensation Fund, but further provided that in the event said employer made no report of payroll to the Department of Labor and Industries, and was in default for industrial insurance premiums, that said employer was to be restrained from prosecution of any extrahazardous occupation of whatever nature, until said industrial insurance premiums had been made, and bond had been provided for further compliance in the future. (See Remington's Compiled Statutes, Section 7682, set out in the Appendix herein.)

Any employee injured in the course of extrahazardous employment not only was deprived of his right to sue his employer (see Section 7673, Remington's Compiled Statutes, set out in Appendix herein), but was also denied the privilege of suit against any third party at the time said third party tort feasor was a contributor to the industrial insurance fund. (See Section 7675, Remington's Compiled Statutes, under definition of "Workman," set out in the Appendix herein.)

The nature of the Workmen's Compensation Act of the State of Washington differs from that of most compensation acts of the various states of the Union. Outstanding in its individual character, the state industrial

insurance fund is a fund administered by the State of Washington, contributed to by the employers, said contributions formerly being based upon the actual amount of total pay roll, but recently amended so that premiums assessed are based upon actual work hours. This fund has two divisions,—an industrial insurance accident fund, and an industrial insurance medical aid fund. The accident fund consists exclusively of premiums paid by the employer. The medical aid fund, administered likewise by the Department of Labor and Industries, is made up of contributions paid both by the employee and the employer, and is devoted to the purpose of paying for medical and hospital services.

Those occupations which the Legislature has classified as extrahazardous must contribute to the state fund exclusively. There is no alternative. The Department of Labor and Industries is the administerial agency through which the act is made effective. Claims for injuries for compensation are filed directly with the Department, and appeals from the decision of the Supervisor of Industrial Insurance are taken to a board, designated as the Joint Board, specifically created for that purpose.

It has been held by the Supreme Court of the State of Washington in a recent decision rendered in the case of *Vinther v. Department of Labor and Industries*, reported at 76 Wash. Decisions, page 297, that in the administration of the Workmen's Compensation Act the Department of Labor and Industries is engaged in a governmental function in carrying out the duties of the sovereign, and that said Department constitutes an in-

tegral part of the sovereignty of the State of Washington.

The constitutionality of the Washington act was challenged almost immediately following its enactment. The Supreme Court of the State of Washington passed upon the validity of the law in the case of *State ex rel. Davis-Smith Company v. Clausen*, reported at 65 Wash. page 156. The Supreme Court there, speaking through Justice Fullerton, thoroughly analyzed the provisions of the statute.

It became increasingly obvious that the very nature of instrumentalities used in production made it inevitable that injury would occur regardless of fault and therefore since said injuries were incident to industry, in its present form, therefore the proper provision for compensation and medical attention to injured workmen should be borne as the cost of production and should be justly borne by that industry.

This doctrine, the Supreme Court of our state recognized in the case of *State ex rel. Davis-Smith v. Clausen*, 65 Wash. 178. It recognized further that the purpose of the statute was to provide a remedy without consideration of fault to those men who were injured. This legislation must be considered a beneficent statute of a social character designed to cure defects and evils which are necessarily incident to industry in its present state.

Attention is called to the language of the court on page 178 of the case under discussion.

It is significant to note that the Supreme Court of the State of Washington held the Workmen's Compensation Act to be valid and constitutional solely upon the

ground that it was an exercise of the police power of the state. The validity of the Washington Act with relation to its violation of the Federal Constitution has already been determined by this court in the case of *Mountain Timber Company v. State of Washington*, 243 U. S. page 219. The attention of the court is directed to the language of Mr. Justice Pitney, who delivered the opinion for the court as it appears on page 228 thereof as follows:

"The act establishes a state fund for the compensation of workmen injured in hazardous employment, abolishes, except in a few specified cases, the action at law by employee against employer to recover damages on the ground of negligence, and deprives the courts of jurisdiction over such controversies. *It is obligatory upon both employers* and employees in the hazardous employments, and the state fund is maintained *by compulsory contributions from employers* in such industries, and is made the sole source of compensation for injured employees and for the dependents of those whose injuries result in death." (Italics ours.)

Of compelling significance in determination of the character of the act herein under consideration is the language used by the Supreme Court in characterizing the contribution made by industries to the state fund. Attention is directed to the language used by the court on the bottom of page 243 and on top of page 244 in the *Mountain Timber* case, *supra,* wherein the court characterized the contributions and the fund as occupational taxes.

It is interesting to note that the Supreme Court of the State of Washington construed the sections of the statute relating to contribution from employers in the following manner:

"As the charge laid on the persons engaged in the industries named in the act is a pecuniary burden imposed by public authority it partakes of the nature of a tax, and in the language of a distinguished judge discussing a similar question, 'for many purposes might be so spoken of without harm.' But it is manifest that it is not a tax in the sense the word is used in the sections of the constitution to which reference is made." * * *

"It is the consideration which the owners of the industries pay for the privilege of carrying them on. It is, therefore, in the nature of a license tax, and can be justified on the principle of law that justifies the imposition and collection of license taxes generally. In this state, such taxes may be imposed, either as a regulation or for the purposes of revenue, the only limitation upon the power being that such taxes when imposed on useful trades and industries shall not be unreasonable. * * *"

State ex rel. Davis-Smith v. Clausen, 65 Wash. 156 at 203.

Upon the same day that the *Mountain Timber* case, *supra,* was decided by this court, the constitutionality of the New York statute was also determined. In the case of *New York Central Railway Company v. White,* 243 U. S., p. 190, the compulsory character of the law upon which the Washington statute is largely based was recognized.

In considering the argument propounded by counsel that the statute strikes at the fundamentalities of the constitutionality and freedom of contract, the court said:

"And we recognize that the legislation under review does measureably limit the freedom of employer and employee to agree respecting the terms of employment, and that it cannot be supported except on the ground that it is a reasonable exercise of the police power of the State. * * *"

See also *Holden v. Hardy,* 169 U. S. 397.

The Workmen's Compensation Act of the state is an integral unit. It is difficult to understand, in the light of the express recognition, both by the Supreme Court of the State of Washington, and the Supreme Court of the United States, as well as the Court of Appeals of the State of New York, that the act is in derogation of the power of freedom of contract, and can be justified only by virtue of public policy involved as a measure dictated by the general public welfare, how it can reasonably be argued that since the act was imposed upon employer and employee alike, regardless of consent thereto, that this act can be conceived to be contractual in character. If the act as an entity is non-contractual, and constitutes an imposition of sovereign will upon its citizens for the benefit of the state as a whole, then it follows, *a fortiori*, that no part of the act can be considered as an independent unit, contractual.

This court has defined its concept of contracts in relation to Section 10, Article I of the Constitution. In the case of *Crane v. Hahlo*, reported at 258 U. S., p. 146, Mr. Justice Clarke, speaking for the court, said as follows:

"It has long been settled by decisions of this court that the word 'contracts' in Sec. 10 of Article I of the Constitution is used in its usual or popular sense as signifying an agreement of two or more minds, upon sufficient consideration, to do or not to do certain acts. 'Mutual assent' (express or implied) 'to its terms is one of its very essence.' *State of Louisiana ex rel. Folson v. Mayor and Administrators of New Orleans*, 109 U. S. 258, 288; *Freeland v. Williams*, 131 U. S. 405, 414; *Essex Public Road Board v. Skinkle*, 140 U. S. 334, 340; *Morley v. Lake Shore & Michigan Southern Ry. Co.*, 146 U. S. 162, 169; *Garrison v. City of New York*, 21 Wall. 196, 203. * * *"

"The origin of the right is thus wholly statutory, an act of grace by the legislature, as if 'consulting the interests of morality,' so that there is nothing in the nature of a contract in it, and therefore there is nothing in the case for the contract impairment clause of the Constitution to operate upon.' "

In the case of *North Alaska Salmon Company v. Pillsbury,* reported at 174 Cal., page 1, the question as to the character of the relationship between employer and employee under the industrial insurance act of the State of California was directly in issue, since in that case the injured workman suffered an accident while working in Alaska, the contention being that the act was contractual and therefore the *locus* of the injury was not controlling, but rather since the relationship was that of the contract of the place where the contract is entered into and determined the rights of the parties. Upon rehearing of the case before the Supreme Court, a former decision of the Supreme Court was reversed. In the first instance, the court held that the relationship was one of contract. Thereafter, the court said as follows:

"The liability of employer to pay compensation arises from the law itself, rather than from any agreement of the parties. The law operates upon a status, i. e., that of employer and employee, and fixes certain rights and obligations to that status. True, the relation of employer and employee has its inception in a contract, but once the relation is created, its incidents depend not upon the agreement of the parties, but upon the provisions of the law. Our decisions upholding the validity of this legislation have been emphasized, and found support in, the proposition that the statute is one regulating the rights and obligations attaching to the status of employer and employee. * * *"

"There is a manifest difference between a compulsory act, like ours, and elective acts, like the Roseberry Act of 1911 (Stats. 1911, p. 796) and various statutes in

other states, under which the compensation provisions are dependent upon the election or consent of the employer and employee. It may well be said that the rights declared by an elective statute have their origin and sanction in the agreement of the parties to be bound by relative rights and obligations are not founded upon contract. Nor do they correspond with the legal conception of a tort, since a liability is imposed without regard to the element of wrongdoing on the part of the person charged. The obligation is to be defined as a statutory one, attached by law to a given status."

See, likewise,

Alabama G. S. R. Co. v. Carroll, 97 Ala. 129; 11 South 803;

also

Dormidy v. Sharon Boiler Works, 127 Fed. 485.

It is significant to note that the California court, in considering New Jersey and Connecticut cases, said as follows:

"The statutes of both New Jersey and Connecticut, however, made the scheme of compensation dependent upon the election or consent of the parties to the employment, and the decisions cited are put on the ground that the rights of the parties are contractual—a position which cannot be applied to a compulsory statute like ours."

In those states where the Workmen's Compensation Act is compulsory, the rule is uniform and likewise the interpretation. Attention is called to the case of *Ocean Accident and Guarantee Corp. Ltd. v. The Industrial Commission of Arizona et al.,* reported at 32 Arizona 275, 257 Pac. 645, wherein the court said in the following language, on page 282 thereof, as follows:

"This act, so far at least as the employer is concerned, is compulsory in its nature; he has no option as to whether he shall accept or reject it, and the whole

language, both of the constitutional amendment authorizing it and of the act itself, shows clearly that they were based, *not on the old theory of contract between the parties,* but upon the inherent right of the state, recognized by the Supreme Court of the United States in the case above cited, by virtue of its police power, to establish certain rules regulating the status of employer and employee. We therefore hold that the present Arizona Workmen's Compensation Act is neither elective nor contractual in its nature, but, on the contrary, that it rests upon the police power *to regulate the status of employer and employee* within the state of Arizona, and that no contract, express or implied, made within or without the state of Arizona, unless expressly so authorized by our law, can of itself affect the rights and duties of such status. It is governed so far as this subject is concerned, solely by the provisions of the Arizona statutes, and nothing else." (Italics ours.)

In passing, it is interesting to note that the Arizona court considered the decisions of the *Mountain Timber* case, *supra,* and the *White* case, both decided by this court, and interpreted those decisions as establishing the principle that the New York act and the Washington act, both being of a compulsory nature, did not create a contractual status between the employer and the employee. This court, however, has expressly passed upon the question of what sort of relationship is created under the Workmen's Compensation Act.

The case of *Cudahy Co. v. Parramore,* reported in 263 U. S. 418 at p. 423, came before this court upon review of the holding of the Supreme Court of Utah. On page 421 of this case, the following language is found:

"Workmen's Compensation legislation rests upon the idea of status, not upon that of implied contract; that is, upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operations he contributes

his work as the owner contributes his capital—the one for the sake of the wages and the other for the sake of the profits. The liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured."

To the same effect, see the case of *Lane v. Industrial Com'r of the State of New York,* 54 Fed. Reporter, (2d), page 341. To the same effect is the case of *Obrecht-Lynch Corp. v. Clark,* reported at 130 Fed. (2d) at page 144.

The Workmen's Compensation Act, Section 7713 of Remington's Compiled Statutes of the State of Washington, makes provision that the employer shall deduct from the pay of each of his workmen engaged in extrahazardous work one-half of the amount the employer is required to pay into the medical aid fund. The employer bears the entire cost of payment of compensation, as provided by the act, for disability, but for medical treatment the employee is required to pay into the separate and distinct medical aid fund an amount equal to that contributed by the employer. It is significant to note that there is no choice upon the part of the employee. He must make such payment. The employer is authorized and mandated to make such deduction. In view of the holdings, as above set out, that the relationship created is one of status rather than contract, it can not reasonably be argued that the relationship of the employee is that of contractor. On the contrary, the Legislature has imposed an obligation upon him to contribute in a small measure towards the defrayal of expenses of his medical and hospital care, just as the state has enacted a tax in

the nature of a license tax upon industry. This likewise constitutes a tax assessed under the sovereign powers of the state upon the workmen engaged in extrahazardous occupations. This state exacts the tax to be administered, in its judgment, calculated to best serve the interests of the great majority of its people, and it would seem that the fundamental elements of contract, a meeting in agreement, voluntarily of the minds of the parties as distinguished from any contemplation of coercion does not exist so as to create contractual relationship between the employee and the employer. In the exercise of its police power, the state, through the Legislature, may impose an assessment upon the employee towards the defrayal of such medical and hospital expenses as will be incurred. To say that merely by virtue of the fact the state compels the workman to make a contribution, in a small measure, as well as the employer, that sole fact, by reason thereof, creates a contract is to disregard the fundamental nature as to both the Workmen's Compensation Act in this state and the fundamental elements of a contract.

The Washington Workmen's Compensation Act constitutes the exercise of a governmental function. There is no contractual relationship contemplated with individuals, either employer or employee, but the statute makes regulations and rules governing industry at large and governing the relationship of master and servant calculated to serve the best interests of society.

It is submitted that the Workmen's Compensation Act of the State of Washington, being of a compulsory nature, created no contractual rights, and therefore the amendment to the law enacted in 1927, which provided

that a claim for aggravation of disability was to be made within three years from the termination of compensation did not constitute a law impairing the obligation of contract within the prohibition of Section 10, Article I of the Federal Constitution.

2

THE AMENDMENT OF 1927 DID NOT CONSTITUTE A DEPRIVATION OF ANY VESTED RIGHT POSSESSED BY APPELLANT

It is of paramount importance, in considering the question of vested right in this particular instance, to distinguish between the right which might have accrued to the appellant to have his claim re-opened *in futuro* had the statute been construed to create a contractual obligation and the right to have said claim re-opened as a vested right. It is freely conceded that if our statute were to be construed to constitute a contract, and were we to disregard the issue of police power and the effect that it would have upon the right to modify or impair a contract thereunder, that the appellant might have cause for complaint. However, this would have been true only were the statute to be construed to be contractual. It is submitted that the issue has been conclusively adjudicated against the theory that the rights created by statute in our state are contractual. Therefore, the appellant must of necessity rely upon the theory that in any event the right which he has acquired by statute is a vested right.

At this point it is timely to point out that from a constitutional standpoint there is a vital difference between a right accruing by virtue of a contract and a vested right. That which may be enforceable by virtue

of contract *in futuro* may be not vested, but rather contingent and inchoate, and yet be a right impairable as a contractual right by the legislation such as the amendment here in question. At this point it becomes pertinent to remark that in any event, as will be pointed out in this brief, the power resides in the Legislature, under the authority of the police power of the state to pass such legislation as this, even were there to be an impairment of contract, were such legislation not unjust and arbitrary.

What is a vested right? Black, in his Law Dictionary, Second Edition, page 1203-1204, defines vest as follows:

"VEST. To accrue to; to be fixed; to take effect; to give a fixed and indefeasible right. An estate is vested in possession when there exists a right of present enjoyment; and an estate is vested in interest when there is a present fixed right of future enjoyment."

"VESTED. Accrued; fixed; settled; absolute; having the character of giving the rights of absolute ownership; not contingent; not subject to be defeated by a condition precedent."

In Bouvier's Dictionary, the word "vest" is defined as follows:

"VEST: To give an immediate fixed right of present or future enjoyment. An estate is vested in possession when there exists a right of present enjoyment; and an estate is vested in interest when there is a present fixed right of future enjoyment."

A vested right must be one which is fixed and determined; one which is capable of being exercised immediately without the necessity of any further occurrence of any event; or, if to be enjoyed in the future, the right must be so vested that the lapse of time alone stands

between the right and its full and certain enjoyment and exercise. If there be any uncertainty in determination as to whether the right will ever be fully reduced to possession or enjoyed, if there be necessity for the occurrence of a condition precedent before the right is capable of enjoyment, if the right is inchoate at the time the amendatory legislation is passed, if at that time it is not fixed and certain, then in those cases where the right is not a contractual one, it cannot be said to be a vested right and the legislation which effects it cannot be said to be such as within the mischief provided against the 14th Amendment to the Federal Constitution.

This court had occasion to consider what constituted a vested right in the case of *Pearsall v. Great Northern Railway Company*, Vol. 161, United States Reports, p. 646. The question before the court at that time was whether or not certain privileges by way of certain authority granted to a railway company to connect its railroad with other branches of railroad and to consolidate it with other roads having the same general direction or location, was such a right as to constitute a vested right which could not be repealed by subsequent legislation.

The court on page 672 of the opinion, said as follows:

"A vested right is defined by Fearne, in his work upon contingent Remainders, as 'an immediate fixed right of present or future enjoyment;' and by Chancellor Kent as 'an immediate right of present enjoyment, or a present fixed right of future enjoyment.' 4 Kent Com. 202. It is said by Mr. Justice Cooley that 'rights are vested, in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant,

when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent, when they are only to come into existence on an event or condition *which may not happen or be performed until some other event may prevent their vesting.'* Principles of Const. Law, 332." (Italics ours.)

It is interesting to note that the court held in this case that this bare power did not constitute a vested right. It now becomes pertinent to analyze the character of the right of the appellant herein. In 1927 the appellant was injured. Thereafter, his claim was adjusted in 1928, and he was paid whatever compensation was due him and his claim terminated. He was entitled to no further consideration unless other conditions subsequently occurring or some would be change in his physical condition. See *Mullin v. Dept. of Labor and Industries,* 157 Wash. 329, at page 332, as follows:

"There is no evidence to support the application for a re-opening of the claim. There was no change in respondent's condition. In fact, the testimony of respondent's physician witnesses was to the effect that the condition of respondent at the time of the departmental rehearing in May, 1929, was substantially the same as when he was examined in December, 1926, by three physicians in Tacoma.

"The respondent's failure to obtain work is not proof of aggravation of injury. There is no statutory authority upon such a state of facts as is here presented for re-opening the claim."

The above citation is authority for the rule that in order for a claimant to establish the right to have his claim re-opened, he must show a definite change in physical condition, and only then, and at that time, would he be entitled to further consideration. Before the time of actual physical change in condition develops, he is

possessed merely of an inchoate right similar in character to the inchoate right of dower, as in the case of dower where the widow's right becomes vested upon the death of a husband, so in the case of a workman prosecuting a claim for re-opening on aggravation, the right would vest at the time an actual change in his physical condition occurred. The necessity for further events to determine subsequent compensation admits a contingency which must occur before the right becomes vested, and clearly demonstrates that the right is not vested within the meaning of definitions commonly accepted to be accurate.

The appellant contends most earnestly that the amendment in question deprives the appellant of full compensation which he is to receive as a result of the injury by virtue of the law then in force. An analysis of what is meant by full compensation as provided by the statute, disclosed the following: When a man is injured, under the Washington statute, he is placed upon time loss until his physical condition becomes such as will allow him to return to gainful occupation. During this time, he is paid the amount provided by law. At the time he is enabled to return to work, an adjudication is made by the Department as to the permanent effects of his injury, based upon the disability he will have for the rest of his life, and the award is made for permanent partial disability upon that finding. This disability not only is compensation for his present condition, but it constitutes an attempt on the part of the Department of Labor and Industries to fix his permanent disability

which he will have for the rest of his life as nearly as possible. The section which provides for continued jurisdiction, the section here under discussion, exists not for the purpose of determining future disability, but constitutes added precaution taken by the Legislature, so that should there have been an error in the calculation of the Department of Labor and Industries as to how much disability a man would permanently have, as disclosed by future developments, that error might then be corrected, so that the provision for the re-opening of a claim was in its fundamental nature remedial rather than substantive, and existed for the purpose of correction.

When compensation has been terminated with a permanent partial disability award, this constitutes an end to the rights of the claimant, unless some new factor should develop. This new factor, as has been pointed out heretofore, constitutes the contingency. This new factor alone constitutes the basis for the reopening of a claim. It is clear to be seen that full compensation as a result of the injury has been paid when the award is made at the time the claim is closed, and the permanent partial disability has been awarded, just as was done in this case. To be entitled to any further benefits, there must be something new shown in the way of a change in physical condition. Then, at that time, a right which must be enforced by a new proceeding, that is, a claim for re-opening, must be filed.

However, this arises only upon the changed condition, and is therefore governed exclusively by the law in force and effect at the time this change occurs. Those individuals whose conditions had changed so as to entitle them to a re-opening of their claims at the time the

amendatory statute was passed had this right saved to them by the saving clause appended to the amendatory section.

Counsel for the appellant has cited authority establishing the proposition that a statute may create vested rights. However, even did counsel's contention represent the prevailing law, yet counsel has made the fatal error of assuming that the right herein contended for is a vested right and has failed to offer any authority establishing this contention.

Numerous cases are discussed which define the rule to be that vested rights which have already accrued, and are created by statute, may not be impaired by subsequent legislation. The very necessity for a contingency to develop in this class of cases, which may never develop is conclusive evidence of the uncertain character of the right sought herein to be exercised. That certainly is the most potent argument against the appellant's contention that this is a vested right. It is not logical to argue, in view of the accepted definitions, above set out, that an inchoate and contingent claim which may never be reduced to possession, and which may never become such a right capable of being enjoyed and fully possessed, can be classed as a vested right.

See, also, the case of *Standard Oil Company v. Industrial Accident Commission*, described by the Circuit Court of California, and reported only in 31 Pacific (2d) Series, page 459. See, also, *Mullin v. Department of Labor and Industries, supra.*

It will be noted that the Supreme Court of Oregon has held that a claim for additional compensation on ac-

count of aggravation is a new and distinct proceeding. We cite the case of *Graves v. State Industrial Accident Commission,* 112 Oregon 143, as follows:

"Nevertheless, it is a proceeding with a distinction and individuality all of its own from a decision in which an independent appeal may be taken to the Circuit Court of the county in which the claimant resides."

This, likewise, is the only construction which may be placed upon the Washington act, since the section under contemplation provides that an application may be filed for re-opening on the grounds of aggravation. If this be true, it must follow *a fortiari,* that the condition precedent to exercising the right to aggravation is that an aggravation or change of condition for the worse must actually exist at the time such application is made.

It is interesting to note that the same contentions raised by the appellant in the case herein were raised and passed upon by the Supreme Court of Ohio in the case of *State ex rel. Boswell v. Industrial Commission of Ohio,* reported at 125 Ohio State Reports, 341. One Boswell had been injured December 9, 1916. His claim for compensation had been terminated March 30, 1917. Thereafter, and on or about May 14, 1930, he filed with the Industrial Commission an application for modification of award. The Industrial Commission refused to consider the claim on the grounds that there was no jurisdiction in the commission. The fact that the Ohio Industrial Insurance Act is compulsory in its nature, and that the act is administered by an industrial insurance commission similar to that of the Department of Labor and Industries of the State of Washington in character, we believe, makes this case so squarely in point as to admit

of no distinction of any consequence, either in fact, or in principle between that case and the case now before this court for decision. The action of the Industrial Insurance Commission of Ohio was based upon the law as amended in 1931 of that year. The statute as amended limited the time within which a claim to re-open might be filed (see index).

The court goes on to comment that the jurisdiction of the commission is definitely limited. We refer to the language of the court as to the contentions made by the claimant, contained on pages 345-346 of the above case.

The very contention was made in the *Boswell* case as is made by the appellant in the case herein. It is interesting to note the reasoning applied by the court in passing upon this contention, contained on page 346, of the above case, as follows:

"The language of the amended statute is clear. The only question presented is whether the amended statute is valid in so far as it affects claims filed prior to its enactment. * * *

"The precise contention then of each of the several relators is that by reason of the unlimited jurisdiction of the Industrial Commission under the original provisions of Section 1465-86, General Code, he could reassert his claim for compensation throughout an indefinite period of time upon the development of any disability or impairment which could be connected with or traced to the injury upon which the initial claim was based, and that such provision creates in him a vested right which no statute can divest or modify.

"This contention loses sight entirely of the nature of the right involved. It is not a common-law right, but one solely of statutory creation under authority of Section 35, of Article II of the state Constitution. The award made pursuant to the statute had no relation to common-law negligence. *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 37 S. Ct., 524, 61 L. ed., 1086, L. R. A. 1918

C, 451 Ann. Cas. 1917 E, 900; *Zajachuck v. Willard Storage Battery Co.*, 106 Ohio St. 538, 140 N. E. 405; *State ex rel. Crawford, Exr. v. Industrial Commission*, 110 Ohio St. 271, 143 N. E. 574.

"In the course of the opinion in the first case cited, the court said: 'The remedy which the compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court * * *.'

"In the course of the opinion, by Marshall, C. J., language is used which is quite pertinent here: 'Workmen's compensation administration is not circumscribed by the limitations which usually attach to the finality of judgments rendered by courts, because its orders are clearly recognized as purely administrative, and not judicial, and full power and authority is conferred to make modifications and changes with respect to former findings or orders as in the opinion of the commission may be justified.'

"The jurisdiction of the Industrial Commission is continuing only because the statute made it so. It could have been originally provided otherwise. It could have been made to continue for a stated period. The authority, having been conferred by statute, may by it be modified or withdrawn.

"The award made by the Industrial Commission is in each instance based upon the disability shown to have resulted from the injury sustained. To take care of probable future contingencies—a recurrence of disability or subsequent impairment due to the injury—authority was conferred upon the commission to take cognizance thereof. The right of claimant could at best be but a *contingent right* subject to change or modifications by statute. * * *

"The fact that an application for modification of award has been filed, and was pending at the time of the passage of the amended section, does not affect the question. Whatever rights existed were by virtue of the statute and were the same whether an application, for which the statute makes no provision, was or was not filed."

Comment upon the above language would be merely superfluous, since the words themselves as expressed by

the Ohio Supreme Court, simply and clearly portray what we conceive to be proper enunciation of the principle applicable to the facts in this case.

The repeal of the law offering a bounty for salt manufactured within the State of Michigan constituted no interference with vested rights. See *Salt Company v. East Saginaw*, 80 United States Reports, p. 373, 377-379.

From the case of *Ferry v. Spokane P. & S. Ry. Co.*, 258 U. S. Reports 314, at p. 320, the following language is cited in discussing dower:

"Expressing the power of the legislature over it, the court said 'during the life of the husband the right is a mere expectancy or possibility. In that condition of things, the law-making power may deal with it as may be deemed proper. It is not a natural right. It is wholly given by law, and the power that gave it may increase, diminish, or otherwise alter it, or wholly take it away. It is upon the same footing with the expectancy of heirs, apparent or presumptive, before the death of the ancestor. Until that event occurs the law of descent and distribution may be moulded according to the will of the legislature.' "

It is submitted that the above language can be applied with equal force and logic and most aptly to the question now before the court that the right to further compensation by way of aggravation of disability is not a natural right—it is wholly given by law, and the power that gave it may increase, diminish, or otherwise alter it, or wholly take it away. It is upon the same footing as the expectancy of heirs, apparent or presumptive, before the death of the ancestor. The general law regulating the relationship of employer and employee with reference to the welfare of the workers and the employers may be

molded according to the will of the Legislature; in its wisdom it may decree as interest of the public generally demands.

The very nature of the sovereign power of the people of the State of Washington, expressed through the Legislature, implies the reservation to change or alter, for the interest of the public at large the terms and conditions of general remedial legislation or a rule of common law. See the case of *White v. United States*, 270 U. S. page 180.

See also the case of *State ex rel. McKittrick v. Bair*, reported in Vol. 33 Missouri, page 1, at page 14.

To the like effect, see also the case of *Addiss v. Selig*, 264 N. Y. S. 816.

An analysis of the statutory provisions demonstrates that the appellant has no vested right to medical services. In order for his right to be vested, it must have been certain, fixed and absolute. It would seem that a right cannot be considered a vested right unless it is something more than such a mere expectation as may be based upon an anticipated continuance of the present general laws.

It becomes apparent upon perusal of the statutory provision that at the time of the claimant's injury compensation was adjusted on January 17, 1928. All vested rights at that time were fully satisfied by the payment of compensation and the rendering of such medical service as had been required. The appellant's condition had been determined at that time and had reached a fixed stage, and compensation for any disability had been rendered. The claimant's right to further medical service, would, of necessity, be contingent upon a change in condition

which would warrant creating the right at the time of such change in the appellant to have his claim re-opened. Any time prior to the time appellant's claim would be re-opened, he would not be entitled to medical service for the reason that the condition precedent and necessarily prerequisite to the right to further medical service would be the change in physical condition.

See Cooley's Constitutional Limitations, pages 749 and 752:

"But while this interest remains in expectancy merely,—that is to say, until it becomes initiate,—the legislature must have full right to modify or even to abolish it."

Continuing along this line of thought, it is readily apparent that the particular provision of the Workmen's Compensation Law which provided for a re-opening of a claim upon the grounds of aggravation of disability constituted not a vested right, but merely an expectancy which would become vested at the time of the happening of the contingency, just as in the case of dower, the husband's death initiating and maturing a right from an inchoate expectant state to an absolute fixed and vested right. Until the aggravation actually occurs, the right to re-open at any time in the future is no more than a general declaration of public policy. The right to re-open on the ground of change of condition before any change of condition actually took place, it is submitted, could be entirely withdrawn if the legislature deemed it to be wise in the public interest. If it could be entirely withdrawn, it follows that at the time within which such re-opening could be claimed, it might also be modified as the public weal dictated. For those rights which had al-

ready accrued, the Legislature enacted the saving clause allowing three years from the date of the taking effect of the amendment within which claim for further compensation might be presented.

The unsoundness of the argument that a vested right is created at the time of the injury to a re-opening *in futuro* by the injured workman is readily apparent when a hypothetical case is propounded.

Suppose that Jones, while engaged in an extrahazardous employment, cuts his finger. The cut is of a minor nature requiring one visit to a doctor. Jones returns to work within a week, and the finger has completely healed. From a medical standpoint, there is no possibility that the workman's finger will ever become worse as a result of the injury. Yet, following the contention of the appellant, Jones would have a vested right for the rest of his life to come in and file an application for re-opening upon the ground that his condition had become aggravated. This, in spite of the fact that he had completely recovered from whatever effects of the injury he had sustained. This would be such a right as the Legislature would have no power to interfere with, under the theory advanced by the appellant, since such amendatory legislation would interfere with that which the appellant urges to be a vested right. It is submitted that the propounding of this hypothetical state of facts clearly demonstrates that there can be no vested, matured and accrued right until the happening of the contingency, namely, the change of condition.

This argument applies with equal force to the contention that the vested right to compensation, as well as

the vested right to medical aid service, are both impaired by the 1927 amendment to Section 5, Chapter 74, Subdivision (h) of the Laws of 1911.

3

RIGHTS PURELY STATUTORY FALL WITH THE REPEAL OF THE STATUTE CREATING THEM

Universally, it is recognized that the rights which are conferred by statute and which in their inception are purely statutory, fall and are abolished by the repeal of the statute, unless at that time the rights so conferred have been reduced to final judgment. This principle was early recognized in the case of *Yeaton et al. v. United States*, reported at 9 U. S. Reports, page 281.

The doctrine from its inception evidently seemed to have been directed to those cases involving penalties, but in its development of the principle soon broadened to cover all cases where the rights conferred were purely statutory in origin. The above rule was recognized and followed in the case of *Norris v. Crocker*, 54 United States 429, and also in the case of *Insurance Company v. Ritchie*, 72 United States Reports, page 541, at page 544.

The decision in the above case was approved by this court in the case of *Ex parte McCardle*, 74 U. S. 506, at p. 514. The court there enunciated the broad general principal of law as follows:

"On the other hand, the general rule, supported by the best elementary writers, is, that 'when an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed.'"

In the case of *Steamship Company v. Joliffe*, 69 United States Reports, page 450, this same principle of

law was involved. It is to be noted in this case that there were but seven justices sitting, and there was a division of the court of 4-3. There was involved the collection of pilotage fees, as provided by an act of California in 1861. The court construed that this act created a contractual obligation, holding that when a vessel is spoken for by a pilot and his services declined, he should be entitled to one-half pilotage fees, and that these fees were in the nature of a contract implied by law. These pilotage fees had accrued under the statute. The law providing for these fees subsequently was repealed, and its terms thereinafter re-enacted. The contention was made that since the law was repealed before the final disposition of the cause, the rights accruing thereunder fell with the repeal of the statute. The majority of the court, through Mr. Justice Field, held that tender of services by the pilot constituted as follows:

"The transaction, in this latter case, between the pilot and the master or owners, cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a *quasi* contract. * * *

"When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."

The court proceeds to justify its holding further on the theory that the re-enactment of the statute operated as a continuance of the statute.

Attention is called to the dissenting opinion recorded on pages 463-464 of the above case, to which Miller,

Wayne and Clifford dissent. The general rule is stated to be as follows:

"The proposition is, that the statute of California, under which plaintiff below recovered his judgment, has been repealed since the writ of error was sued to this court; and that the action being wholly dependent on the statute, the repeal takes away the right, and the judgment which he has obtained must be reversed, and the case dismissed. * * *

"I take the law to be well settled that a right of action not growing out of contract, but which is solely dependent upon a statute, ceases and determines with the statute on which it depends."

It is to be noted that the entire court was agreed upon the fundamental principle of law involved, that is, when a right is purely statutory, it falls with the repeal of the statute, unless the rights thereunder have been prosecuted to final judgment, and unless the right was contractual in nature. The court divided upon the question as to whether or not the right involved accrued by virtue of a transaction contractual in nature, or whether it was purely statutory in its inception. This general principle of law, as above outlined, has been recognized in later cases and has been continued in full force and effect with no modifications. Only in cases where rights have been construed to arise out of contracts has the court been inclined to modify the rule that where rights are created by statute, they fall with the repeal of the statute unless prosecuted to final judgment.

See, also, *Gwin v. United States*, reported at 184 U. S., page 669.

However, in the case of *Flanigan v. Sierra County*, reported at 196 U. S. 561, at page 553, this court not only followed the rule laid down in the case of *Steam-*

ship Company v. Joliffe, supra. but also committed itself to the doctrine that it would be bound by the decisions of the highest court of the state as to the rule followed in that state with relation to the effect of repealing statutes upon rights which had accrued prior to the statute. In the *Flanigan v. Sierra County* case, an action was brought to recover the amount of a license ordained under an ordinance passed by the county May 31, 1900, under and by virtue of a county government act. The court, speaking through Mr. Justice McKenna, on page 560, in this case, used the following language in recognizing the rule as we have hereinabove set out as follows:

"The general rule is that powers derived wholly from a statute are extinguished by its repeal. Sutherland on Statutory Construction, Sec. 165. And it follows that no proceedings can be pursued under the repealed statute, though begun before the repeal, unless such proceedings be authorized under a special clause in the repealing act. 9 Bacon's Abridgement, 226.

"In speaking of the rule as to enforcements of rights under repealed statutes, Endlich on the Interpretation of Statutes (sec. 480), says: 'The same rule applies to rights and remedies founded solely upon statute, and to suits pending to enforce such remedies. If at the time the statute is repealed, the remedy has not been perfected or the right has not become vested, but still remains executory, they are gone. * * *' " (Page 561) above citation.

"Whether a statute of a State is or is not a revenue measure certainly depends upon the construction of that statute. Besides, if in any case we should lean to an agreement with the state court, this is such a case." (Page 562) above citation.

This court follows the rule laid down by the highest state court. We need but to point to the decision in the case at bar, reported at 76 Wash. Advance Decisions Number 5, 255, at page 257, for an enunciation of the

rule. The court in the case at bar on page 257 thereof, said as follows:

"In each of the first two cases cited will be found a considerable discussion leading to the holding that the workmen's rights under the law existing at the time of the injury are purely statutory rights, and may be taken away at any time by the legislature, and therefore the limitation contained in the act of 1927, which is here complained of, is purely remedial and destroys no vested right."

At an early date the Supreme Court of the State of Washington recognized the above quoted principle to be the law in this state.

See *Bailey v. School Dist. No. 49,* 108 Wash. Reports, page 612, at 613.

The above case was cited with approval by the Supreme Court in the case of *Robinson v. McHugh,* 158 Wash., page 157.

"Where a tort action can be *brought only by virtue of a statute,* there can be no vested right therein, and the legislature may take away the right at any time."

This rule was again enunciated and followed in the case of *Denning v. Quist,* 160 Wash. 681, 686:

"This act, according to the declaration of legislative policy therein contained, and its manifest purpose, should be classed as remedial legislation. * * * Rights of action vested by the act in favor of injured workmen *(Robinson v. McHugh, supra)* became thereafter purely statutory rights, not common law rights. * * * This right being purely statutory, it was competent for the legislature to limit the same, and was accomplished by the 1929 amendment, *supra,* and we are satisfied that the correct rule was laid down by this court in the case of *Robinson v. McHugh, supra.*"

The Supreme Court of the State of Washington has committed itself to the doctrine that rights which are

purely statutory in their inception may be taken away by the Legislature, at its will, before said rights are reduced to final judgment. Under the doctrine of the *Flanigan* case, above cited, it would seem that this court is bound by that rule of law. This court likewise has unvaryingly held to that principle as so announced in the *Flanigan* case. See

United States v. Heinszen & Co., 206 U. S. p. 370;
Louisiana v. Mayor of New Orleans, 109 United States, page 285.

"* * * The obligation to make indemnity created by the statute has no more element of contract in it because merged in the judgments than it had previously. * * * The right to reimbursement for damages caused by a mob or riotous assemblage of people is not founded upon any contract between the city and the sufferers. Its liability for the damages is created by a law of the legislature, and can be withdrawn or limited at its pleasure."

Louisiana v. Mayor of New Orleans, supra;
Pacific Mail Steamship Co. v. Joliffe, 2 Wall 450-507.

The rule contended for was likewise followed in the case of *District of Columbia v. Eslin*, reported in Vol. 183 U. S. page 62.

A very recent expression of opinion reiterating the rule to which the Supreme Court has steadfastly adhered was given in the case of *Coombes v. Getz*, 285 U. S. page 434. A California statute had provided that directors of corporations should be liable to the creditors for all monies embezzled or misappropriated by corporate officers. Thereafter, this section of the law was repealed. The contention was made that this repeal constituted a law impairing the obligation of contract. The Supreme

Court, speaking through Mr. Justice Sutherland, quoting from page 442 of the above case, held as follows:

"The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was not *purely statutory*. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule."

Here, again, this court followed the rule. Significantly Justice Sutherland draws the distinction that the right sought to be enforced in the instant case under consideration was not a *purely* statutory right, and he himself italicized "*purely,*" but had its basis in the contractual liability created by the law. Justice Sutherland cites the case of *Ettor v. Tacoma,* 228 U. S. 148, and emphasizes the fact that the right to recover against the city by virtue of the provision of the statute was vested completely at the time of the repeal and *was contractual in nature.* Mr. Justice Sutherland goes on to cite the language used in the *Joliffe* case, *supra,* which is quoted on page 29 of this brief, said language being directed towards the emphasis of the proposition that when the rights are contractual, if they have vested before the statute is repealed, they remain in force, unabridged. But on the other hand, if they are purely statutory in origin and creation, they fall with the repeal of the statute. It is enlightening to consider Mr. Justice Sutherland's analysis of those California cases which established the rule

"That where a right is created solely by a statute, and is dependent upon the statute alone, and such right is still inchoate, and not reduced to possession or perfected by final judgment, the repeal of the statute de-

stroys the remedy, unless the repealing statute contains a saving clause." *Coombes v. Getz,* 285 U. S. p. 448.

It is interesting to note further the language cited by Mr. Justice Sutherland on page 448 of the above decision as follows:

"It is settled by decisions of this and other federal courts *(Ettor v. Tacoma,* and cases cited in connection therewith, *supra)* that, upon the facts here disclosed, a contractual obligation arose; and the right to enforce it having become vested, comes within the protection of both the contract impairment clause in Art. 1, Sec. 10, and the due process of law clause in the Fourteenth Amendment, of the Federal Constitution."

Counsel relies upon the decision in the case of *Ettor v. Tacoma,* reported at 228 U. S. 148, in support of his contention that a vested right may be acquired under a statute, irrespective of whether or not such right is purely of a statutory nature, or whether its origin springs from contract, and further that so long as this right is vested, the legislature may not enact legislation which in any way would interfere with the exercise of said right. It is of salient significance to note that Mr. Justice Sutherland reconciles the *Ettor* case to this general principle, by classifying it with those cases where the obligation is of a contractual nature.

This decision would seem to establish the law, beyond any question of doubt, that only in those cases where rights are contractual in origin is there any prohibition against subsequent legislative enactment which would interfere with the enjoyment of said right. If the right is purely statutory, and even though it be vested, said right is subject to be divested unless reduced to final judgment by action of the Legislature.

See, also, the late case of *United States v. Chambers*, 291 U. S. 223, decided February 25, 1934.

The decisions of the state court recognizing the principle above set out are legion. The rule seems to be uniformly adhered to by the highest courts of the several states.

Continental Oil Co. v. Montana C. Co., 63 Montana p. 230;
Moss v. Smith, 171 Calif. 788;
New London Northern Railroad Co. v. Boston & Albany R. R. Co., 102 Mass. Rep. 386;
Taylor v. Strayer, 78 N. E. 236;
Mickey et al. v. Barton, 62 N. E. Reporter 802.
Bennet v. Hargus, 1 Neb. 421;
Bueletin v. Palmer, 1 Hill N. Y. 332;
Pacific Gas & Elec. Co. v. State, 6 P. (2d), 214 Cal. 431.

In 1927 the Legislature of the State of Washington amended the Workmen's Compensation Act. The wording taken from Chapter 310 of the Session Laws of 1927, page 834, entitled Sec. 4, reads as follows:

"That section 4 of chapter 131 of the Laws of 1919, page 355, as amended by section 2 of chapter 136 of the Laws of 1923, page 387 (section 7679 of Remington's Compiled Statutes) be amended to read as follows:

"(h) If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the director of labor and industries, through and by means of the division of industrial insurance, may, upon the application of the beneficiary, made within three years after the establishment or termination of such compensation, or upon his own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment: *Provided*, Any such applicant whose compensation has heretofore been established or terminated

shall have three years from the taking effect of this act within which to apply for such readjustment." (Session Laws, 1927, Subd. (h).)

This particular subdivision of the Workmen's Compensation Act has remained unchanged, since the original enactment in 1911. However, from time to time, it has been re-enacted in the Laws of 1923, and then thereafter in the Laws of 1929, in the same language as originally appeared in 1911. It is a well settled rule of statutory construction that whenever the Legislature declares that an existing statute is to be amended "to read as follows," etc., it thereby evinces an intention to make the new Act a substitute for the old one and that so much only of the original Act as is repeated in the new one is continued in force, and all portions omitted from the new Act are repealed. *Continental Oil Co. v. Montana C. Co.*, 63 Mont. 223.

The Legislature, in the enactment of the 1927 Amendment, as above set out, repealed the provisions of this particular subdivision as originally contained in the Workmen's Compensation Act in all respects wherein the 1927 act differed, and was inconsistent with the language contained in the section as it previously stood. The law of 1927, Section IV, Subdivision (h), as it was then enacted perforce must supersede and extinguish the provision contained in the law which the legislature enacted it to amend. The original language of this particular provision as it last stood upon the statute books of the State of Washington appeared in the 1923 Session Laws at Chapter 136, Section 2, Subdivision (h) thereof, as follows:

"(h) If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the Department may, upon the application of the beneficiary or upon its own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment." (Session Laws, 1923, p. 397.)

It is manifest that since Subdivision (h) of Section IV of Chapter 310 of the Laws of 1927, in so far as it is inconsistent with Subdivision (h), Section (2) Chapter 136 of the Laws of 1923, supersedes and abolishes those provisions of the 1923 statute in which it differs. The section of the 1923 statute, above referred to, provided no limitation within which a workman might apply for a re-opening of his claim after the termination of compensation or the establishment of compensation. The 1927 amendment provided that application for re-adjustment upon the grounds of aggravation, diminution or termination of the disability was to be made within three years from either the date of the establishment or the date of termination of compensation. The wisdom of this legislation is not a matter for judicial review. Suffice it to say that in the efficient administration of the act in order to impose the costs for accidents where they properly should fall, the Legislature deemed it necessary that the costs which would accrue from any claim should be decided within a definite period of years.

It needs no quotation of authority to establish that the common law knew nothing in the nature of a Workmen's Compensation Act. The right of a workman to receive compensation and medical attention at the ex-

pense of the industrial insurance fund is purely a creature of the statute, having its inception, origin and creation in the statute, being dependent for its continued existence upon the statute. Since such rights as the workman enjoys are under the Workmen's Compensation Law in this state, and since it partakes not of the nature of a contractual obligation inevitably it follows from the the light of the foregoing authority that upon the repeal of the statute all those rights which are dependent upon the statute fall with the statute to which they owe their creation, saved solely as they are kept alive by the saving clause.

Applying this general rule to the facts in the instant case, it is obvious that the rights of the appellant, such as they were, must be governed by the law as it was amended in 1927. The right conferred by statute which the appellant deemed himself entitled to, that is, to present an application for re-opening in the event the contingency of a changed physical condition developed at any time during the remainder of his life was taken away not only from him, but from all workmen, whether they had ever been injured or not, since the statute did not constitute a contract, but was to the contrary a matter of general legislation, unless filed within time provided by statute.

However, the amendment which provided that the claimant must file an application for re-opening his claim, as above set out, within three years from the date of termination of his claim, preserved the continuing power, without limitation of time to re-open the claim upon his own motion at any time in the Director of the

Department of Labor and Industries, so that only as a matter of absolute right to have his claim re-opened, has the position of the appellant been affected by the 1927 Amendment.

4

THE WORKMEN'S COMPENSATION ACT IS REMEDIAL LEGISLATION AND CONSEQUENTLY CREATES NO VESTED RIGHTS

That the majority of accidents which occur in industry under its present highly mechanized and complex nature occur either entirely without fault on the part of the employer or under such circumstances as would bar the employee from recovery by reason of his contributory negligence is commonly known. It has been widely accepted by the courts of various jurisdictions that the Workmen's Compensation Laws are highly remedial in character.

Attention is called to the case of *Mountain Timber Co. v. State of Washington*, reported at 243 U. S. 228, wherein Mr. Justice Pitney, speaking for the court, cites the provision of the Washington Act which sets forth the declaration of the police power of the state in relation to withdrawing all matters under the act from private controversy, and wherein the court notes that sure and certain relief, regardless of fault, is to be accorded to the workmen injured in extrahazardous work, and their families and dependents.

This court, in the case of *New York Central Railroad Company v. White*, 243 U. S. 168, decided the same day by Mr. Justice Pitney, speaking for the court in considering the character of the legislation, said as follows:

"It is plain that, on grounds of natural justice, it is not unreasonable for the State, while relieving the employer from responsibility for damages measured by common-law standards and payable in cases where he or those for whose conduct he is answerable are found to be at fault, to require him to contribute a reasonable amount, and according to a reasonable and definite scale, by way of compensation for the loss of earning power incurred in the common enterprise, irrespective of the question of negligence, instead of leaving the entire loss to rest where it may chance to fall—that is, upon the injured employee or his dependents."

For a complete consideration of the remedial character of the act, see the case of *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 165, and more particularly the language contained on pages 175 and 210 thereof.

Attention is directed to the case of *In re Duncan*, 73 Indiana Appeals, page 270, 127 N. E. 289. The court in that case said:

"The Workmen's Compensation Act sought the correction of recognized errors and abuses by introducing new regulations for the advancement of the public welfare. Being remedial in character, it should be construed with regard to former laws and the defects or evils to be corrected and the remedy provided."

See also:

Guay v. Brown Company, 83 N. H. p. 392, 142 Atl. 699;

Gossen v. Township of Borgholm, 174 Minn. p. 229;

Rothschild & Co. v. Marshall, 44 Fed. Rep. (2d) 548.

This court, in considering the nature of the Workmen's Compensation Act, in the case of *Southern Pacific Co. v. Jensen*, 244 U. S. 205, at page 218, said as follows:

"The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary

processes of any court and is not saved to suitors from the grant of exclusive jurisdiction."

See also:

Christensen v. Morse Dry Dock and Repair Co., 214 N. Y. S. p. 732, at p. 740;

Newman Co. v. Industrial Commission, et al., 187 N. E. 137, at 138;

Raymond v. Industrial Com., 354 Illinois, 586.

It becomes apparent upon an analysis of the cases that remedial legislation falls into two catagories, first, that legislation which goes solely to procedure, and is concerned with those things only that provide the method for the enforcement of substantive rights. The law is well settled that there is no vested interest in matters of remedy, and that the remedy in each instance may be changed, modified and altered by the legislature, provided that there is a substantial remedy remaining for the enforcement of the substantive right. This principle of law is conceded by appellant.

See:

Terry v. Anderson, 96 U. S. 628;

South Carolina v. Gaillard, 101 U. S. 433;

The Collector v. Hubbard, 79 U. S. Rep. 1, at p. 14;

Freland v. Williams, 131 U. S. 420;

Home Bldg. & Loan v. Blaisdell, 78 L. Ed. Advance Opinions, 255.

Particularly pertinent not only in support of the theory under discussion at the present moment, but also singularly applicable to the facts in this case, is the language of this court used in the case of *Wisconsin & Michigan Ry. Co. v. Powers*, 191 U. S. 379 at 387, as follows:

"The broad ground in a case like this is that, in view of the subject matter, the legislature is not making

promises, but framing a scheme of public revenue and public improvement. In announcing its policy and providing for carrying it out it may open a chance for benefits to those who comply with its conditions, but it does not address them, and therefore it makes no promise to them. It simply indicates a course of conduct to be pursued, until circumstances or its views of policy change. It would be quite intolerable if parties not expressly addressed were to be allowed to set up a contract on the strength of their interest in an action on the faith of a statute, merely because their interest was obvious and their action likely, on the fact of the law."

It is an accepted concept, as above pointed out, that workmen's compensation laws, are, in their nature, remedial. It becomes pertinent to consider whether or not those general principles of law applicable to the power of change of procedure and remedy by the legislature are to be applied to this character of remedial legislation. In its fundamental essence, the Workmen's Compensation Act is not based upon negligence. Legislation of this sort was born out of social expediency. It is not based, as above pointed out in this brief, upon theory of fault.

Even though from a broad and general viewpoint of natural humane rights a natural right is recognized by society in the workman to be provided for in the case of injury regardless of fault, still, from the standpoint of vested rights, this sort of legislation creates no property rights. It is purely dependent upon the concept of the public welfare. It is subject to change, since it has its origin in the theory of public welfare. Those rights conferred may be changed, modified and altered or withdrawn as the public welfare dictates. It is imperative that in order to accomplish the purposes for which this

type of legislation was enacted that it remain plastic and capable of being molded, changed and altered to meet those ever-changing developments so characteristic of contemporary life. This constitutes the second category of remedial legislation.

This is the theory upon which the rule of law is based that when the rights are purely statutory and owe their continued existence to the continuation of the statute from whence they sprang, they fall with the repeal of the statute.

Singularly applicable to a discussion of the nature of rights created by the Workmen's Compensation Act with reference to their remedial character and concerned with the type of right conferred, whether vested or not, is the case of *Allen v. Mottley Construction Co.*, 160 Va. 875, decided by the Supreme Court of the State of Virginia June 27, 1933. That case involved exactly the same situation in fact and in principle as is presented in the case at bar. The court, in considering the problem, held first, that it was indispensable that in order for there to be a basis for consideration of a claim for re-opening, there must have been an actual change in physical condition, since final payment had been made.

It is interesting to note that this court cited the Appellate Court of Indiana, Division No. 1, in the case of *In re Hogan* (75 Ind. App. 53) 129 N. E. 633, on certification of the question by the industrial board of that state, as follows:

" 'The board shall not make any such modification upon its own motion nor shall any application therefor be filed by either party after the expiration of one year from the termination of the compensation period fixed in

the original award, made either by an agreement or upon hearing.'

"The court, in giving this part of the section a retroactive effect, said:

" 'It is a statute of limitations. Such statutes are considered necessary to the welfare of society. They are enacted on the presumption that one having a well-found claim will not delay enforcing it. They neither create nor destroy rights, but pertain to the remedy solely.' "

Thereafter, the Virginia court proceed to cite the case of *Marchuk v. Pittsburgh Terminal Coal Corp.* (106 Pa. Super. Ct. 249) 161 Atl. 771, saying:

" 'The amendment relates to procedure and applies to pending cases and is not confined to accidents which occur after its passage and approval. The contrary contention made in behalf of the claimant is fully disposed of in the case of *DeJoseph v. The Standard Steel Co.*, 99 Pa. Super. Ct. 497, and *Johnson v. Jeddo Highland Coal Co.*, 99 Pa. Super. Ct. 94.'

"It must be emphasized that a change in condition is quite different from the right to recover for the injury itself * * *."

(Here the Pennsylvania court considers the very character and nature of the rights conferred by the act, and defines the fundamental basis of such rights as are created by workmen's compensation.)

"In some states limitations of different periods for the two differ. As an illustration, the Indiana act places a limitation of two years on the injury resulting from the accident, and one year on a reopening of the case on a change of physical condition. In the analysis of cases this distinction is extremely important. As previously pointed out, the purpose is well defined and often misapplied. It is essential to determine whether a case presents a claim for injuries by accident or a change in actual physical condition subsequent to the original award. A change in condition is based upon an award in a compensable case. *Its object is purely remedial, as it enlarges or diminishes the former award to meet the*

circumstances of a particular case." (Italics ours.) (Page 886, above citation.)

The Pennsylvania court held that the right to re-open, as distinguished from the original right to compensation was a matter of remedy; in its essence and character was created purely and simply for the purposes of remedying any error in the original adjudication, or any remedy which might have developed from the original injury which could not have been calculated definitely at the time of the original adjudication as to compensation and award due. The right is characterized as being purely and entirely remedial. The Virginia court goes on to say on page 887 as follows:

"'The citations of authorities against construing statutes retrospectively, where they disturb vested rights, do not apply to remedial statutes; by all authorities remedial statutes are an exception to the rule.' * * *

"Inchoate rights derived under a statute are lost by a repeal of the statute before they are perfected unless they are saved by express words in the repealing statute." *Crawford v. Halsted and Putnam*, 20 Gratt. (61 Va.) 211.

The fact that the State of New York, the State of Maryland, the State of Oregon, the State of Washington, the State of Virgina, the State of Pennsylvania and the State of Indiana, all in the administration of their industrial insurance acts, found it necessary to enact limitations of time within which the right to re-open the claims for the reason that condition had changed, completely demonstrates the reasonableness of the legislation enacted by the State of Washington, and further constitutes a most persuasive argument that Workmen's Compensation legislation in general, being new and experimental, must be plastic, and that power must be held to

be reserved to be in the Legislature to make such changes as circumstances, in the course of time and development, dictate.

See also the case of *Marchuk v. Pittsburgh Terminal Coal Corp.* (106 Pa. Super. Ct. 249), 161 Atl. 771.

The theory that in the enactment of this remedial legislation, the Legislature retains an inherent right to amend at any time, and that no vested rights are to be impaired, since none were created, is the fundamental concept upon which this legislation is based. We cite the case of *Thornton v. Duffy,* reported at 99 Ohio State Reports 120, 124 N. E. 56. The facts in that case are briefly as follows: Originally, the Workmen's Compensation Act of that state provided for insurance with private carriers. Thereafter, by legislation enacted, it became compulsory to contribute to the state fund. Prior to the time of this subsequent enactment, the employer had contracted with a private insurance carrier for insurance upon his employees. His contention was that this subsequent enactment constituted an impairment of contract, and therefore violated the 14th Amendment of the Federal Constitution. The court, in deciding against this contention, said as follows:

"Under the provisions of section 35, Article II of the Constitution, the general Assembly was not required to make any such exception in favor of any employer, but could have required every employer mentioned in subdivision 2 of section 13 of that act to pay into the state insurance fund the amount of premium determined and fixed by the state liability board of awards; and, if it could have done this, then undoubtedly it can at any time amend section 22 of that act by striking out such exceptions in favor of employers of sufficient financial ability to render certain the payment of compensation to injured employes. * * *

"It necessarily follows that if the General Assembly has the power at any time to withdraw from these employers this privilege to elect to pay such compensation and furnish such services and attention and funeral expenses directly, it can from time to time impose such condition as in its judgment seem wise and necessary to safeguard the main purpose and intent, not only of the act itself, but of the constitutional provisions under authority of which this law was passed."

See:

Louisville & Nashville Rd. Co. v. Mottley, 99 Ohio State Reports, p. 128.

Thereafter, upon appeal of this case to the United States Supreme Court, Mr. Justice McKenna, speaking for the court in 254 U. S. Reports, page 368-369, made observations which we submit are conclusive of the issues presented in this case, as follows:

"* * * To assert that the first steps of a policy make it immutable, is to assert that imperfections and errors in legislation become constitutional rights. This is a narrow conception of sovereignty. It is, however, not new and we have heretofore been invoked to pronounce judgment upon it. Complying, we said that an exercise of public policy cannot be resisted because of conduct or contracts done or made upon the faith of former exercises of it upon the ground that its later exercises deprive of property or invalidate those contracts. *Louisville & Nashville R. R. Co. v. Mottley,* 219 U. S. 467."

The question came before the Washington Supreme Court for interpretation in the case of *Mullen v. Department of Labor and Industries,* 157 Wash. Reports, 329. The court, in interpreting the provision, held that the claimant was not entitled to have his claim re-opened on the ground of aggravation for disability unless his condition had become worse as a result of the injury; his condition having remained the same, since the time his

claim was closed, he was not entitled to have his case reopened.

The case of *Schmeiling v. Department of Labor & Industries,* 167 Wash. 692, decided under this provision, followed the *Mullen* case where a workman was injured in 1920.

The court said:

"By the provisions of Laws of 1927, Chapter 310, p. 844, Section 4, subd. (h) (Rem. 1927 Sup., section 7679) an application by the beneficiary of the act must be made within three years after the establishment or termination of such compensation, or within three years after the taking effect of that act where the compensation had theretofore been established or terminated, from and after the taking effect of the act."

See also:

Ferguson v. Department, supra, 168 Wash. 677, 679-682.

The interpretation as rendered by our Supreme Court in the *Mattson* case is now the well settled law in this state. A thorough search of the authority reveals but few instances where this question has been presented under exactly the same circumstances to the highest court of the respective states for construction. The New York Court of Appeals passed upon this question in the case of *Vincent v. Allerton House Co.* reported at 256 N. Y., page 522. The Workmen's Compensation Act of that state, Section 15, Subdv. 6 (a) as added by the Laws of 1927, Ch. 557, prohibited reclassification of a disability unless made within one year of the occurrence of an accident. The court held the amendment was intended to have application in respect to classification of all injuries, whether previously or subsequently occurring and affected the remedy and not the right. The State Indus-

trial Board had no power, therefore, to reclassify in 1929 disabilities for which the claimant had received compensation in 1927.

It is interesting to note that the claimant was injured before this 1927 amendment went into effect, as the appellant in this case, and that thereafter the amendment was added which effected the earlier power as to time within which to reclassify. This case had been re-opened in the year 1929. An award was made reclassifying claimant's condition. The Court of Appeals of the State of New York, at pages 522, 523 and 524 of the opinion, said:

"After the accident and injury had occurred subdivision 6-a was added to the law. It reads: 'The board may, within one year from the date of accident, upon its own motion, or on application of any party in interest, reclassify a disability upon proof that there has been a change in condition, or that the previous classification was erroneous and not in the interest of justice. (Laws of 1927, ch. 557, in effect July 1st, 1927.) This subdivision was effective to forbid reclassification unless made within one year of the occurrence of the accident. (*Matter of Schaefer v. Buffalo Steel Car Co., supra.*) In this instance the reclassification was not made within the time fixed. We think that this subdivision was intended to have application, in respect to a reclassification of all injuries, whether previously or subsequently occurring; *that it affected the remedy and not the right; that it was applicable to the case of this claimant.*" (Italics ours.)

Attention is called to the striking similarity of the statutes of the State of Washington and the State of New York. An examination of the facts of the above case reveals that this case is squarely in point on all fours with the case at bar.

Appellant cites the case of *Leone v. Tricario*, 245 N. Y. S. 81, as authority to sustain his contention. Yet, he chooses to disregard the fact that the Court of Appeals of the State of New York, in passing upon the very question herein involved, in the *Allerton* case, *supra*, laid down the rule urged by the appellee herein. The *Leone* case would be of no value even if it were in point, since the court of last resort, as pointed out, has laid down the principle squarely as contended for by the State of Washington, herein. The same is true of the case of the *Industrial Commission of Ohio v. Kamrath*, reported at 118 Ohio State Reports 1, 160 N. E. 470.

Counsel for appellant has apparently overlooked, in citing the case of *Industrial Insurance Commission of Ohio v. Kamrath*, the case of *State ex rel. Boswell v. The Industrial Commission of Ohio*, reported at 125 Ohio State Reports 341, which is exactly in point in fact and in principle with the case herein, and, as we have pointed out earlier in this brief, lays down the rule for which we are here contending. Of course, this later decision must be taken to be the law of Ohio at the present time, and consequently the *Kamrath* case, even were it in point, would be of no value, since it does not represent the present Ohio law.

Another case committed to the same interpretation made by the Court of Appeals of New York is the case of *Ireland v. Shipley*, 165 Maryland Rep., page 90, decided by that court in April, 1934. In that case, one Ireland, employed by Shipley, was injured July 31st, 1934. His employer was insured with the New Amsterdam Casualty Company. An award was made and compensation began the 24th day of August, 1924. On May

26, 1932, some eight years later, a request was made to the Industrial Commission of Maryland for a hearing to determine the nature and extent of the permanent disability of the claimant. At the time of the injury, Section 40, Article X of the code, was in language almost identical with the Washington statute before it was amended, and repeats almost the very words of the language of the Washington statute in this particular regard. (See Appendix.)

The court says:

"Prior to the Act of 1931 it was the apparent policy of the State that the jurisdiction of the commission to change or terminate compensation to conform to changed conditions was continuing and not limited as to the time within which it might be exercised. That act effected a change in that policy by limiting the time within which the continuing jurisdiction might be exercised to one year next following any final award. * * *"

Note language on 101 as follows:

"But while the Legislature had not the power to deprive the employee of such rights, it had undoubtedly the power to regulate the time and mode for the assertion of them."

Further, on page 102, the following language is found:

"It is contended that the act should not be interpreted as applying to any award made prior to its passage. But that contention is not only inconsistent with the actual language of the statute, but also with its apparent purpose and intent. The rational basis of the policy underlying the act is that there be some definite time limit in respect to the award of compensation, in order that employers may organize their business and insurers adjust their rates with an intelligent comprehension of the demands they may be called upon to meet. That purpose would be largely frustrated if any claim which had been dealt with prior to the Act of 1931 could

be again considered at any time in the future. And since all persons whose rights accrued prior to that act are accorded the same privilege of asserting them as is given to persons whose rights may have accrued, or may accrue subsequent thereto, the holders of such rights are not injured. There is therefore, no sufficient reason for holding that the language of the act, that 'no modification or change of any final award of compensation,' means anything more or less than it says, and that it includes every final award, whether before or after the act."

A reading of the opinion of the Maryland Supreme Court allows no interpretation other than that the court considered that the Workmen's Compensation Act conferred no vested right; that the law was a matter of general policy, and that it was within the power of the Legislature to enact as a condition precedent to the right to re-open upon a change of condition due to the accident, that such right be exercised within a definite period even though at the time the employee sustained the injury there was no limit to the time within which he might request a re-opening of his claim on the ground of change of condition.

See, also:

Smolen v. Industrial Commission, reported at 154 N. E. 443, 324 Illinois 32;

Duquoin et al. v. Industrial Commission et al., reported at 329 Ill. 543;

County of San Bernardino v. Industrial Accident Commission, 217 Cal. 618, 13 Pac. (2d) 829.

It logically follows that since this Workmen's Compensation Act is remedial legislation, the rule applies that remedial legislation creates no vested right, but just as in matters of remedy and procedure, there is the inherent power in the legislature to modify, alter and

withdraw, or limit and expand as the exigencies of the public welfare may demand.

5

THE AMENDMENT IN QUESTION CONSTITUTES A VALID EXERCISE OF THE POLICE POWER

Were it possible to conceive that the Workmen's Compensation Act of the State of Washington has created a contractual relationship between the employer and the employee in the state, or were it possible to conceive that a vested right had accrued to the appellant which the Legislature had not the power to annul by repealing legislation which had created it, yet it is submitted that this amendment, even though it did repeal the obligation of contract and did deprive the appellant of a vested right would be justifiable as an exercise of the police power of the state. It is necessary only to have recourse to the introductory section of the Workmen's Compensation Act, contained in Section 7673 of Remington's Compiled Statutes, which has remained unaltered since its enactment in the Laws of 1911, page 345, Section 1. This section is set out in the Appendix.

The constitutionality of the Washington Workmen's Compensation Act was upheld by the State of Washington in the case of *State ex rel. Davis-Smith v. Clausen,* 65 Wash., page 156. On Section 177, after considering the various objections urged, the court said as follows:

"The test of the validity of such a law is not found in the inquiry, Does it do the objectionable things, but is found rather in the inquiry, Is there no reasonable ground to believe that the public safety, health or general welfare is promoted thereby? The legislature cannot, of course, without violating this clause of the constitution,

declare a particular industry, commonly engaged in by the people, to be unlawful which, under all circumstances, must necessarily be harmless and innocent; but it can regulate and control and prohibit any industry, however innocent it may have been in its inception, whenever it becomes a menace to the employees engaged in it, the people surrounding it, or to any considerable number of people at large, no matter from whatsoever cause the menace may arise. This it does under the police power: 'the power inherent in every sovereignty * * *' the power to govern men and things!''

It is well recognized that the matters of police power are not rigidly defined, but that which constitutes a proper exercise of the police power is arrived at only through application of the rule of inclusion and exclusion.

This court is not concerned with the wisdom of legislation. The question is, Does it have a reasonable relation to the object sought to be accomplished? Is it arbitrary and capricious, or dedicated to the accomplishment of a public purpose within the police power of the state? It is submitted that since the entire Workmen's Compensation Act of the State of Washington was justified by the police power of the state, that this amendment, as an integral part of the statute, constitutes a reasonable exercise of the police power of the state.

The next question to be considered is whether or not it is reasonable legislation and whether or not it has for its purpose the accomplishment of an object concerned with the public welfare. Industry meets the costs of accidents in the following manner: In each particular industry there is established a base rate. This base rate is based upon the cost experience which is arrived at by computing the cost of accidents in that particular indus-

try. Each individual firm has an individual rate, which is made up in the following fashion: Sixty per cent of its own cost experience is added to 40 per cent of the base rate for the industry. This cost experience is computed upon the basis of the experience at the outset on a 5-year experience; until a firm has been in business for 5 years, it is charged at the base rate for the industry.

It becomes evident that it is important in making up the rates of contribution to be levied upon each individual employer, that his costs be ascertained, so that his rates may be properly adjusted. Therefore, the Legislature deemed it wise and expedient in order that the costs be fixed and certain, so that act could be efficiently administered, that all costs to accrue in the case of any particular injury should be known within a definite period of time. Therefore, a definite limitation was placed upon time for re-opening of a claim. This became necessary for the reason that if a claim were to be re-opened 15 or 20 or 30 years after the compensation had been terminated and further payments made, it would then be necessary in order to recoup to the fund the amount expended by way of medical treatment and compensation to assess these costs against the rate of the individual employer of the employee who was at the time injured. However, should that firm have gone out of business; should it have sold out to another firm; should it have merged with another firm; should it have changed the character of its business and engaged in another field of enterprise—in the event of any of these hypothetical occurrences, the costs could not be charged against these firms, and would have to be levied against

industry as a whole. Hence, there would be a further imposition of costs for accidents upon firms other than that particular firm in the employ of which the man was injured. Obviously, this would constitute unfair and inequitable procedure as far as those other employers are concerned, and constituted a result to be avoided, for not only would said firms be then carrying the burden of their own costs experience, but they would be obliged to pay the costs of accidents incurred while a man was in the employ of another firm, which costs that other firm should justly have had charged against its own cost experience.

In order to accomplish an equitable result, it became apparent after several years of the operation of the Workmen's Compensation Act, that it would be necessary to arrive at a fixed total cost per accident, within a reasonable time after the accident had occurred and compensation had been terminated. It is submitted that since the Workmen's Compensation Act imposed a liability without fault upon the employer, it is reasonable exercise of the police power to adjust the administration of costs so that they will fall as nearly as possible upon those industries which caused the accidents to occur. It was the legislative intent, as nearly as possible, to make each particular employer bear the burden within reasonable limits of the accident incurred by reason of his operations.

Note the case of *Ireland v. Chipley, supra,* 165 Maryland, page 90.

Again, the comment is made that the fact so many of the states having the industrial insurance law have deemed it wise to pass the same legislation upon the

right to re-open a claim upon change of condition is the best evidence of the fact that this legislation is reasonable.

In passing, it may be said that since the passage of this act there have been paid six or seven hundred thousand claims filed with the Department of Labor and Industries. If this amendment were held to be unconstitutional, it would mean that all these claims would be entitled to be re-opened as a matter of right, could sufficient grounds be established. While this might prove of advantage to the workman, it would impose a tremendously unfair burden upon remaining industry. It is common knowledge that by virtue of the economic situation which has prevailed within the past five years, a large number of industries have fallen by the wayside. A great number of firms in this state in whose employ men have been injured during the past 23 years no longer exist. It is most obvious that the cost would be imposed upon those firms still operating which have no connection whatever with the injuries of the men sustained. Thus, in effect, the result so carefully sought to be guarded against by the Legislature would be accomplished to the defeat of the purpose of the act, and the protest which would be raised in the event of any such occurrence would be of such turbulence as to cause the industrial insurance act, as it now stands, to be eliminated from the statute books.

A thorough consideration of the invocation of the police power with regard to the Washington Compensation Act was given in the case of *Mountain Timber Company v. State of Washington*, 243 U. S. 219; also a thorough consideration of the police power with reference

to its application to the Workmen's Compensation Act was given in the case of *New York Central Railway Company v. White*, decided that same day, and reported at 243 U. S., page 201. It would serve no purpose to cite at length cases dealing with the exercise of the police power. Each case must stand or fall upon the particular facts therein involved. It is submitted, however, that if the Legislature, when in the exercise of the police power, may impose liability without fault upon employers, and may further deprive employees of common law rights of action against employers, it would seem to follow that the Legislature would be well within its exercise of the police power in providing for the regulation of the exercise of the rights to re-open on the grounds of aggravation. Most especially so, when by saving clause it is provided that in all cases where injuries occurred prior to the enactment of the law, the time was to be further extended three years from the date the law became effective.

No more apt or timely illustration of the extent of the legislative enactment justifiable under the police power can be found than that contained in the case of *Home Bldg. & Loan Ass'n v. Blaisdell*, Vo. 78 Advance Opinions, No. 5, pages 255-271. This enactment is a reasonable exercise of the police power.

See:

Barber v. Connolly, 113 U. S. 31;
Munn v. Ill., 94 U. S. 124;
Black v. Hush, 256 U. S. 131;
Leasy v. Siegal, 258 U. S. 242;
Wheeler v. Jackson, 137 U. S. 245;
Davis v. Mills, 194 U. S. 451;
Jacobson v. Mass., 197 U. S. 11.

It is a well-settled rule of law that in challenging the unconstitutionality of a statute, the burden is thrown upon the challenger to show that such law is unreasonable, and arbitrary and capricious action is not justifiable under the police power of the state.

See:

Cooper Co. v. Hammer, 250 U. S. 400.

6

THE UNITED STATES SUPREME COURT IS BOUND BY THE INTERPRETATION OF THE STATE LAW AS DECIDED BY THE HIGHEST COURT OF THAT STATE

Settled definitely is the rule that the Supreme Court of the United States is bound to follow the interpretation placed upon the legislature of the highest court of that state. We quote the following cases which substantiate this position:

Quong Ham Wah v. Insurance Commission, 255 U. S. 448;

Northern Pac. R. Co. v. Meese, 239 U. S. 619;

Flanigan v. Sierra County, supra, 196 U. S. 553.

It has been decided by the State of Washington, in the case at bar herein, following the decision of the Supreme Court in the case of *Schmeiling v. Department*, 167 Wash. 692, and *Mullen v. Department*, 157 Wash. 329, and *Ferguson v. Department*, 168 Wash. 667, that Subdivision (h) of Section IV, Chapter 310 of the Laws of 1927, constitutes a limitation upon the right to apply for a re-opening of the claim on the grounds of aggravation of condition. The construction has been made that this is a condition precedent, that is, in order for the right to be perfected, said right must be exercised within three years, as provided by statute. It is there-

fore submitted that the United States Supreme Court is bound by this interpretation made by the state court, and since the state court has interpreted this as being a matter of procedure, and since there is no vested right in the matter of procedure, since there has been no impairment of any vested right of the claimant herein.

Attention is respectfully directed to the case of *Flanigan v. Sierra County,* above cited, 196 U. S. 553, as authority for the rule that the Supreme Court is bound by that rule which has been adopted in the State of Washington. Applying the principle to the facts herein, it becomes evident that if this argument is sound, that those rights which accrued to the appellant by virtue of the law in effect at the time he was injured, exist only at the pleasure of the legislature, and were consequently properly modified at the time the law was amended.

7

THE RIGHT TO SUE A SOVEREIGN MAY BE WITHDRAWN BY THE SOVEREIGN AT ITS PLEASURE

In the recent case of *State of Washington v. Newton Vinther,* 76 Wash. Dec., p. 300, wherein the state brought an action to recover from a third party, the sum expended by the industrial insurance fund by reason of injuries caused by the third party to a workman engaged in extrahazardous employment, and wherein the objection was urged that the statute of limitations had run against the suit, in disposing of this contention, the court said as follows:

"In this plan, the remedy provided in Section 7675 is an integral part. The act, as a whole, is the exercise of a governmental function in the fullest sense of the word, having its support in the police power of the state.

The contention of the respondent that the accident fund is a private fund, contributed to by private persons, is hardly consistent with the declared purposes of the act, and was disposed of by this court in *State ex rel. Davis-Smith Co. v. Clausen,* 65 Wash. 156."

Incidentally, it is of interest to note the language contained on the bottom of page 298 of the above case to the effect that:

"The sovereign state can neither be sued nor debarred from suing in its own courts without its consent, is an accepted principle of law, needing no citation of authorities for its support."

This principle was early established in the case of *Beers v. United States,* 61 U. S. 529, and is recognized as being the prevailing law by appellant on page 21 of his brief.

By the Laws of 1921, an administrative code was enacted in the State of Washington. State departments were created, among which was the Department of Labor and Industries, created by the Laws of 1931, page 40, Section 74. This department was authorized, as one of the departments, to carry on the governmental function of the state. Within Section 75, Chapter 41, Laws of 1921, provided for the appointment of a Supervisor of Industrial Insurance, who was to have charge of and supervise the division of industrial insurance, and the administration of the industrial insurance which provides for the administration of the industrial insurance, accident and medical aid funds. The statute makes it mandatory in order for a claimant to recover compensation to file a claim with the Department of Labor and Industries within one year from the date of the accident, and in the case where his compensation has been terminated and

established, and there is a desire for readjustment, he must, within three years from the determination, file an application with the department for a re-opening. This application is in the nature of a claim setting out a cause of action for further compensation on the grounds of changed condition. It is said that the filing of a claim for compensation with the Department of Labor and Industries of the state for further compensation constitutes proceedings in the nature of a suit against the state.

In *Cohens v. Virginia,* reported at 19 U. S. Reports, 405, Chief Justice Marshall delivered the opinion to the court which reads as follows:

"What is a suit? We understand it to be prosecution or pursuit of some claim, demand or request in a court of justice * * *."

The appellant does not question that the filing of a claim for re-opening constitutes a suit against the State of Washington.

Section 7697 of Remington's Compiled Statutes, provides for the administrative procedure to be followed by the department in relation to action upon claims filed. (Appendix.)

That this is a suit against the state is distinctly seen to be a sound concept, since the powers given by Section 7697 of Remington's Compiled Statutes, for the swearing of witnesses and for the taking of testimony before the Board, just as the court of claims in passing upon claims of the United States Government has entertained suits against the government. See *Williams v. United States,* reported in Vol. 77 Advance Opinions, Law Edition, page 577.

"In the former case the requirement is one imposed by the Constitution and equally applicable whether jurisdiction be exercised by a legislative court or a constitutional court; and the latter is simply a provision which the claimant must accept as a condition upon which he may avail himself of the privilege of suing the government."

There is no way other than that provided by the statute for recourse to the industrial insurance fund. The sovereign has prescribed the procedure to be used in prosecuting a claim for compensation since the sovereign can be sued only in the manner prescribed and only with its consent, said consent may be withdrawn or modified as the pleasure of the sovereign dictates for the public welfare.

It is thus apparent that the sovereign has the power in suits prosecuted against itself, so far as the appellant is now concerned, to modify the rules which must be followed in order for it to have a recovery against the sovereign. So, since the sovereign in this case has consented to be sued in the manner prescribed, it may modify that procedure, and therefore the amendment of the law providing for the time within which the claim for reopening may be prosecuted is justifiable upon this theory, as well as upon other theories.

Counsel for the appellant contends on pages 19, 20 and 21 of his brief, citing the case of *Ohio v. Helverling,* 54 Supt. Ct. Reports 725, that the Department of Labor and Industries is engaged in the insurance business and is not carrying out a governmental function. We call attention to the case of *State v. Vinther,* reported at 76 Wash. Dec. 297, above cited, which the appellant admits lays down the contrary rule, that is, holds expressly that

in the administration of the Workmen's Compensation Act, the Department of Labor and Industries exercises a governmental function. Under the rule that the Supreme Court is bound by the interpretation of the highest state court, as hereinbefore discussed, it would seem that this construction of a state statute is binding upon the United States Supreme Court.

Further, the distinction between the *Helverling* case and the case at bar is so obvious that there seems to be scarcely any necessity for drawing a distinction. In the *Helvering* case, the State of Ohio was engaged in the business of buying and selling liquor for profit. This was properly held to be a function proprietory in nature rather than governmental on the part of the state, and the Supreme Court of the United States further limited the effect of its decision to define its effect purely to the question of taxation. Note page 21 of the appellant's brief, where there is an extensive quotation from that case. It requires only a careful survey of the case of *State ex rel. Davis-Smith v. Clausen,* above cited, to dispose of the argument made by counsel that the state is engaged in the exercise of a proprietory function. One need consider only that the contributions are both compulsory and have been designated as an occupation tax and that the fund is to be neither more nor less self-supporting to detect the fundamentally underlying difference between the administration of the industrial insurance fund in this state, and the operation of liquor stores in the State of Ohio.

It is apparent that the state has not withdrawn the right to re-open a claim for industrial insurance; it has

merely modified its consent to be sued; that is, a suit must be instituted within a certain period of time, as hereinbefore pointed out.

Attention is called to the language used by Justice Brandeis in the case of *Lynch v. United States,* reported in 78 Law Edition, page 997, at 1002.

Mr. Justice Brandeis proceeds to point out that had Congress merely withdrawn the consent to sue on the policy instead of abolishing the policy *in toto,* which would have been no impairment of contract as prohibited by the Constitution. It is significant to note that it was of compelling importance to the court that Congress intended to take away the right. We quote the language contained on page 1003 of the above case as follows:

"It seems clear that it intended to take away the right; and that Congress did not intend to preserve the right and merely withdraw consent to sue the United States."

In support of the contention that the filing of a claim with the Department of Labor and Industries is a suit against the state, we quote the following language from the opinion of the case of *Lynch v. United States,* on page 1003, as follows:

"When the United States creates rights in individuals against itself, it is under no obligation to provide a remedy through the courts. *United States v. Babcock,* 250 U. S. 328, 331, 63 L. ed. 1011, 1012, 39 S. Ct. 464. It may limit the individual to administrative remedies. *Tuton v. United States,* 27 U. S. 568, 576, 70 L. ed. 738, 741, 46 S. Ct. 425. And withdrawal all remedy, administrative as well as legal, would not necessarily imply repudiation."

It has been recognized by the Supreme Court of the United States that the Court of Claims is quasi judicial

administration. See *Williams v. United States, supra,* Supreme Court Law Ed. Advance Opinions, 1933-1934, pages 935 to 1029.

We particuarly stress the case of *Rohde v. State Industrial Accident Commission,* reported at 108 Oregon, page 426, wherein it was held that the sole process by which an injured employee can move the State Industrial Accident Commission for an allowance from the industrial accident fund is by filing his own application with the commission as required by statute, and that no jurisdiction is conferred by the filing of a report by the physician and the employer in accordance with the statute.

A careful reading of the *Rohde v. State Ind. Acc. Comm.* case, above cited, will indicate conclusively that the Oregon court considered that this proceeding was in the nature of a suit against the state industrial insurance fund, even though the state did not act as defendant, but rather sat in judgment upon his claim, just as does the Court of Claims in behalf of the United States.

We cite further the case of *Sturtz v. Industrial Insurance Commission,* 91 Wash. 589, which casts illumination upon the concept of the act and upon the concept of the nature of the claim prosecuted to the industrial insurance fund by the workman. The court there notes particularly the necessity of filing an application by the workman in order to gain compensation. If this contention be sound, this proceeding constitutes a proceeding against the state, and it must follow *a fortiori* that the state, in modifying the procedure to be followed is clearly within the exercise of the power inherent in the

sovereign when the sovereign has claimed the privilege of being sued.

Counsel has cited cases as authority for his contention that the right to receive compensation is a vested right which may not be disturbed, and that the law in force and effect at the time governs the amount of compensation to be paid thereafter. It is significant to note that the cases cited are decisions of state courts where the Workmen's Compensation Law is contractual. Note particularly, for example, the case of *Preveslin v. Derby & Ansonia Dev. Co.*, 15 At. 518, 112 Conn. 129. On page 36, of the appellant's brief, the citation clearly reveals the fact that the law there is contractual. The same is true of the New Jersey cases. We have pointed out in this brief that the law in those states is contractual. The same is true of the Maine citations, and also the Minnesota citations. We call attention to the table compiled by the appellant and set forth in the appendix to his brief.

Attention is further directed to the case of *Virden v. Smith et al.*, 210 Pac. 129, 130, contained on page 12 of appellant's brief. We need but point out that that very decision recognizes the fact that it is directly contrary to the *Talbott v. Industrial Insurance Commission* case, reported at 108 Wash. 231. In fact, the court recognized that the *Talbott* case was squarely in point in fact and principle, and also that it laid down the rule exactly opposite to that finally adopted by the court, which refused to follow the decision in the *Talbott* case. Incidentally, by the effect of its decision, the *Talbott* case recognized the remedial character of the Workmen's Compensation Act.

CONCLUSION

It is respectfully submitted that for the following reasons:

(1) That the Workmen's Compensation Act of the State of Washington is compulsory in nature and rests upon statutes and is not contractual;

(2) The amendment of 1927 did not constitute a deprivation of any vested right possessed by the appellant;

(3) Rights purely statutory fall with the repeal of the statute creating them;

(4) The Workmen's Compensation Act is remedial legislation and consequently creates no vested rights;

(5) The amendment in question constitutes a valid exercise of the police power;

(6) The United States Supreme Court is bound by the interpretation of the state law as decided by the highest court of that state;

(7) The right to sue a sovereign may be withdrawn by the sovereign at its pleasure.

That the amendment enacted in 1927, Chapter 310, Subdivision (h) of Section V thereof, is constitutional and does not constitute a violation of Section 10, Article I of the Constitution of the United States, prohibiting any state from passing any law impairing obligation of contract, nor does said amendment deprive the appellant of any vested right without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States of America. It is therefore respectfully submitted that since this legislation was constitu-

tional, the judgment of the Supreme Court of the State of Washington be affirmed.

Respectfully submitted,

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APPENDIX

REMINGTON'S REVISED STATUTES OF THE STATE OF WASHINGTON, SECTION 7673 — DECLARATION OF POLICE POWER:

The common law system governing the remedy of workmen against employers for injuries received in hazardous work is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the workman and that little only at large expense to the public. The remedy of the workman has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage-worker. The State of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workmen, injured in extrahazardous work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this act; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdictions of the courts of the state over such causes are hereby abolished, except as in this act provided.

REMINGTON'S REVISED STATUTES OF THE STATE OF WASHINGTON, SECTION 7682:

(a) If any employer shall default in any payment to the accident fund or the medical aid fund, the sum

due shall be collected by action at law in the name of the state as plaintiff, and such right of action shall be in addition to any other right of action or remedy. If such default be after demand, there shall also be collected a penalty equal to twenty-five per centum of the amount of the defaulted payment or payments, and the commission may require from the defaulting employer a bond to the state for the benefit of the accident and medical aid funds, with surety to their satisfaction, in the penalty of double the amount of the estimated payments which will be required from such employer into the said funds for and during the ensuing one year, together with any penalty or penalties incurred. In case of refusal or failure after written demand personally served to furnish such bond, the state in an action brought by the attorney general in its name shall be entitled to an injunction restraining such delinquent from prosecuting an extrahazardous occupation or work until such bond shall be furnished, and until all delinquent premiums, penalties, interest and costs are paid, conditioned for the prompt and punctual making of all payments into said funds during said periods, and any sale, transfer or lease attempted to be made by such delinquent during the period of any of the defaults herein mentioned, of his works, plant or lease thereto shall be invalid until all past delinquencies are made good, and such bond furnished.

REMINGTON'S REVISED STATUTES OF THE STATE OF WASHINGTON, SECTION 7675:

* * * *Provided, however,* That no action may be brought against any employer or any workman under this act as a third person if at the time of the accident

such employer or such workman was in the course of any extrahazardous employment under this act. * * *

REMINGTON'S REVISED STATUTES OF THE STATE OF WASHINGTON, SECTION 7713 — CREATION OF MEDICAL AID FUND:

A fund is hereby created in the state treasury to be known as the medical aid fund. Into it shall be paid by each employer on or before the 15th day of September, 1923, and on or before the 15th day of January, May and September of each year thereafter for each day's work or fraction thereof done for him in extrahazardous employment in or during the preceding four calendar months the medical aid rate provided in Sections 7676 and 7712 of Remington's Compiled Statutes. (Superseded by Section 7676 as amended.)

The employer shall deduct from the pay of each of his workmen engaged in extrahazardous work one-half of the amount the employer is required by the foregoing provision of this section to pay into said fund for or on account of the employment of such workman.

STATE EX REL. BOSWELL, OHIO AGGRAVATION STATUTE:

"The powers and jurisdiction of the board over each case shall be continuing, and it may from time to time make such modifications or change with respect to former findings or order with respect thereto, as, in its opinion may be justified. Provided, however, that no such modification or change or any finding or award in respect of any claim whether filed heretofore or hereafter shall be made with respect to disability, compensation, dependency, or benefits, after ten years from the last payment theretofore made of compensation or bene-

fits awarded on account of injury or death, or ten years after the injury in case of which no compensation ever has been awarded."

State ex rel. Boswell v. Industrial Commission of Ohio, 125 Ohio State Reports, 345.

CODE OF MARYLAND, SECTION 40, ARTICLE X:

"If changes or circumstances warrant an increase or rearrangement of compensation, like application shall be made. No increase or rearrangement shall be operative for any period prior to application therefor."

CODE OF MARYLAND, SECTION 43, ARTICLE X:

"If aggravation, diminution or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated in any case, the commission may, upon the application of any party in interest or upon its own motion, readjust for future application the rate of compensation in accordance with the rules in this section provided, or in a proper case, terminate the payments."

REMINGTON'S REVISED STATUTES OF THE STATE OF WASHINGTON, SECTION 7697:

Whenever the department of labor and industries has made any order, decision or award, it shall promptly serve the claimant, employer or other person affected thereby, with a copy thereof by mail, which shall be addressed to such claimant, employer or person at his last known address as shown by the records of the department. Any claimant, employer or other person aggrieved by any such order, decision or award must, before he appeals to the courts, serve upon the director of labor and industries, by mail or personally, within sixty days

from the day on which such copy of such order, decision or award was communicated to the applicant, an application for rehearing before the joint board of said department, consisting of the director of labor and industries, the supervisor of industrial insurance and the supervisor of safety. Such application shall set forth in full detail the grounds upon which the applicant considers such order, decision or award is unjust or unlawful, and shall include every issue to be considered by the joint board and it must contain a detailed statement of facts upon which such claimant, employer or other person relies in support thereof. The claimant, employer or other person shall be deemed to have waived all objections or irregularities concerning the matter on which such rehearing is sought other than those specifically set forth in such application for rehearing or appearing in the records of the department. If the joint board, in its opinion, considers that the department has previously considered fully all matters raised by such application it may, without further hearing, deny the same and confirm the previous decision or award, or if the evidence on file with the joint board sustains the applicant's contention, it may, without further hearing, allow the relief asked in such application; otherwise, it shall order a rehearing to decide the issues raised. If a rehearing be granted it shall be heard in the county of the residence of the applicant at a place designated by the joint board, but the hearing thereof may be adjourned from time to time and from place to place within said county, as the convenience of witnesses may require. Such rehearing shall be de novo and summary, but no witness' testimony shall be received unless he shall first have been

sworn to testify the truth, the whole truth and nothing but the truth in the matter being heard, or unless his testimony shall have been taken by deposition according to the statutes relating to superior courts of this state. The joint board shall cause all oral testimony to be stenographically reported and thereafter transcribed, and when transcribed the same, with all depositions, shall be filed in, and remain a part of, the record on the rehearing. Such rehearing may be conducted by one or more of the members of the joint board, or by some person or persons in the regular employ of the department, duly commissioned by said board to conduct such hearing, but the record on rehearing shall be considered by all of the members of said joint board, and the decision of a majority of said joint board shall be the decision of said joint board, and upon such decision being rendered all parties to said rehearing shall be given written notice thereby by the joint board. * * *

Each of the members of the joint board, and those commissioned by it as aforesaid, shall have power to administer oaths; to preserve and enforce order during such rehearing; to issue subpoenas for, and to compel the attendance and testimony of, witnesses, or the production of books, papers, documents and other evidence, or the taking of depositions before any designated individual competent to administer oaths and it shall be their duty so to do; to examine witnesses; and to do all things conformable to law which may be necessary to enable them, or any of them, effectively to discharge the duties of his office. * * *

Within thirty days after the final order of the joint board upon such application for rehearing has been

communicated to such applicant, or within thirty days after the rehearing is deemed denied as herein provided, such applicant may appeal to the superior court of the county of his residence, but upon such appeal may raise only such issues of law or fact as were properly included in his application for rehearing, or in the complete record in the department. On such appeal the hearing shall be de novo, but the appellant shall not be permitted to offer, and the court shall not receive, in support of such appeal, evidence or testimony other than, or in addition to, that offered before the joint board or included in the record filed by the department: *Provided,* That the right of cross-examination shall not be limited by the testimony before the joint board. The proceedings in every such appeal shall be informal and summary, but full opportunity to be heard shall be had before judgment is pronounced. Such appeal shall be perfected by filing with the clerk of the court a notice of appeal and by serving a copy thereof by mail, or personally, on the director of labor and industries. The department of labor and industries shall, within twenty days after receipt of such notice of appeal, serve and file its notice of appearance and such appeal shall thereupon be deemed at issue. * * *

The department of labor and industries shall serve upon the appellant and file with the clerk of the court before trial, a certified copy of its complete record on the claim, which shall, upon being so filed, become a part of the record in such case. If the court shall determine that the department has acted within its power and has correctly construed the law and found the facts, the

decision of the department shall be confirmed; otherwise, it shall be reversed or modified. In case of a modification or reversal the superior court shall refer the same to the department of labor and industries with an order directing it to proceed in accordance with the findings of the court: *Provided,* That any award shall be in accordance with the schedule of compensation set forth in this act.

* * *